

DISCUSSION

THE BASIS FOR CHANGING THE MAINTENANCE (ASSISTANCE) MEASURE FOR CHILDREN – THE CASE OF SEPARATION OF PARENTS IN THE REPUBLIC OF KOSOVO

Ardian Emini,* Berat Aqifi,** Minerva Dermaku***

Abstract: *As a legal cohabitation, marriage is based on moral and legal equality of spouses, feeling of love, respect and mutual understanding, as the basis of unity in the family. Marriage and family enjoy the state's special protection. In this respect, parents, competent bodies and courts, in their decisions and activities, should have, as their primary consideration, the highest interest of the child. The duty and the right of parents is to care for the upbringing, development, welfare, education and schooling of children born in wedlock or out of wedlock. The state and society should provide the necessary support to families to keep their children close, to prevent mistreatment and abandonment, as well as to maintain the stability of the family. In this respect, there is parental responsibility including the totality of rights and duties aiming to ensure emotional, social and material welfare of the child, caring for the child, maintaining personal relationship with the child, providing the child with upbringing, education, schooling, legal representation and administration of his/her assets. This form of responsibility is valid even when there is dissolution of marriage; the responsibility is to assist children until they reach the age of majority. These forms of imposing assistance measures are legal components, determined and taken by court decisions.*

Keywords: *Court, marriage, children's assistance, legal measures, parental responsibility*

INTRODUCTION

Financial maintenance, as a legal means of family law in the first place, is of interest to family members and looking more broadly at its purpose, it is also in the interest of the state itself because when the obligor in providing financial maintenance is not able to do so due to lack of financial means, then this obligation becomes the burden for the state itself. Financial maintenance, according to the rule, is a legal obligation, which can be performed voluntarily by the person who is obliged to provide financial maintenance, but in the absence of voluntary performance, the provider of maintenance will be obliged, through legal ways, to provide financial maintenance to the person entitled to financial maintenance. The right of financial maintenance is a subjective right, which is not prescribed. Nevertheless, the form and determination of assistance, namely financial maintenance, is determined by courts by means of their decisions. It should be noted, however, that the decision of the court on alimony is subject to changes, due to the change of im-

* Prof. Ass. Dr. Ardian Emini, Profesor assistant, University "Kadri Zeka" Gjilan, Republic of Kosovo. ORCID: 0000-0002-4820-9917.

** Prof.Asoc.Dr. Berat Aqifi, Profesor asoced, University "Ukshin Hoti" Prizren, Republic of Kosovo. ORCID: 0000-0001-5020-4608.

*** Dr. Minerva Dermaku, PhD., Candidate. Doctoral student of the University of Library Studies and Information Technologies in Sofia, Bulgaria. ORCID: 0000-0002-6684-4260.

portant circumstances for the determination of that obligation and the determination of its measure. A change in these circumstances entitles the provider and recipient of maintenance to request a decrease or increase in the amount of maintenance provided. Amended circumstances on which the right to alimony depends may lead to termination of maintenance.

I. CHILDREN'S ASSISTANCE MEASURE

In accordance with the Family Law,¹ minor children and adults have the right to parental support, which is regulated by the second and third chapter of the law. Speaking of an adult child, the obligation to support exists if the child is incapable to work and does not have sufficient means for support (as long as such a situation continues), as well as if he/she attends school regularly until the age of 26, in relation to parents' ability. An adult child has no right to maintenance if accepting his or her request for alimony would be an obvious injustice to parents. As for the article 289 of the Law, maintenance, as a rule, is determined in monetary means. It can be determined in another way, but only if the creditor and the debtor agree to it. The amount of support is regulated by articles 289 to 322 of the Law, according to which the alimony creditor of his/her choice may request that the amount of maintenance be determined in a fixed monthly monetary amount or in the percentage of regular monthly monetary amount of the maintenance debtor.²

If the amount of maintenance is determined as a percentage of the debtor's regular monthly income (salary, salary compensation, pension, fees, etc.), the amount of support, as a rule, cannot be less than 15% or higher than 50% of the regular monthly income, debtor maintenance minus taxes and contributions for compulsory social insurances.³ If the alimony creditor is a child, the maintenance amount should provide at least the same standard of living for the child, which is enjoyed by the custodial parent. When it comes to child maintenance by the parents, maintenance can last for a limited and unlimited time within the meaning of article 291-292 of the Law. The amount of support may be decreased or increased according to the circumstances under which the previous decision was made within the meaning of article 292 of the Law.

II. IMPORTANT CIRCUMSTANCES FOR CHANGING THE AMOUNT OF SUPPORT

The law does not provide for the circumstances that may lead to a change in the measure of support, but the answer to this question can be found in case laws. The following will present the grounds of maintenance, which in accordance with the position of the courts affect the change of the measure of maintenance, whether it is decreased or

¹ Official Gazette of RK", Law No. 2004/32 and law No. 06/I-077 on amending and supplementing the family law no. 2004/32 of Kosovo.

² GASHI, H., ALIU, A., VOKSHI, A. Commentary on Law No. 2004/32 on the Kosovo Family. In: *Commentary on Law no. 2004/32 on the Kosovo Family*. GIZ: Prishtina, 2012, pp. 1–714.

³ GARBER, B. D. *Developmental Psychology for Family Law Professionals: Theory, Application, and the Best Interests of the Child*. New York: Springer Publishing Co., 2010, pp 28–30.

increased. First of all, when it comes to changing the material possibilities of the alimony debtor, it is worth mentioning the position in the case law, that in order to increase the obligation of the alimony debtor, two cumulative conditions should not be met - growth, material needs of the creditor and a condition, because the amount of the maintenance contribution is measured according to the needs of creditors and material possibilities of alimony debtor and, these two parameters, are brought into an appropriate relationship.

The High Court of Cassation in its Judgment No. Rev 2239/2021, dated 5 June 2021, held the position that the change of economic possibilities of the support provider is the basis for the invention of the support measure. In this present case, given the factual situation in the said judgment, namely that the alimony debtor's possibilities to ensure maintenance have been significantly reduced, according to the court, leads to the conclusion that the alimony provider enjoys a significantly lower standard of living. If the parent's salary decreases over time, this may affect the extent of the support, but he/she is obliged to establish the facts on which the assessment of his or her ability to contribute to the maintenance of the minor children depends (From the Judgment of the Supreme Court of Cassation No. Rev. 2911/2020, dated 13 October 2020).

In addition, the loss of the alimony debtor certainly affects the change of the amount of alimony (From the Judgment of the High Court of Cassation, Rev. 104/2017, dated 3 April 2017).

In addition to salary, the other type of income of the maintenance debtor can also affect the change of the amount of support, so if the maintenance debtor (parent) can earn income from the copyright, as well as additional profits, it also affects the amount of maintenance (From the judgment of the High Court of Cassation No. Rev 3989/2020, dated 1 October 2020).

It is interesting that the Court of Appeals in Gjilan in its Judgment No. 2 253/2014, dated 2 September 2014, held the position that the employment of a support provider abroad can certainly affect the change of the measure of support. In this present case, it is about work in one of the member states of the European Union, so the court takes into account the notorious fact that the standard in the countries of the European Union, conditioned by social benefits, is higher than that of the country in question and has increased the amount of vital contributions.⁴

What is the impact of the occupation of alimony debtor in changing the amount of support when needed can be found in the judgment of the High Court of Cassation, Rev 82/2020, Rev 139/2020, 28 January 2020, in which, the court states that, in this present case, the increase of the measure of maintenance of the parent, capable of work, is justified, taking into account the amount of salary and the occupation with which he/she has the opportunity to earn additional income and work.

In the same judgment, the court states that the only basis for changing alimony is the education of the child. From the judgment of the Supreme Court of Cassation, Rev. no. 581/2021, dated 11.02.2021, there is a clear confirmation that the change of the support measure is possible due to the upbringing of the child, because according to the court, the costs and needs of the child increase along with their development and upbringing,

⁴ VUKOTIC, S. *Commentary, Family Law*. Beograd: 2005, pp. 30–40.

the needs are reflected in food, clothing, hygiene, education, housing and entertainment, they increase according to the age of the child. In the judgment of the High Court of Cassation no. Rev 1352/2020, dated 15 October 2020, it is stated that if the circumstances have changed on the part of the support recipient (child) since the previous decision was made, if for example needs are higher if he/she is now a high school student and incurs expenses, if he/she has health problems, or he/she takes medication and is on special diet, if the costs of clothes and shoes have increased, which means that their needs have changed in relation to the period when the previous decision on the support measure was taken, there is grounds for changing it.

As the child's monthly needs (food, hygiene, clothing, textbooks, equipment and outgoing with peers) have increased since the previous maintenance judgment, with the child's calendar age and transition from primary to secondary school, increase of maintenance is justified (From the judgment of the Supreme Court of Cassation, Rev. 1342/2020, dated 6 February 2020).

This justification is valid not only for transition from primary to secondary school in terms of increasing the needs of the child or changing the amount of support, but also the enrolment to studies is the basis for changing the decision on the amount of support, especially if the possibilities by the debtor are realistic (Gjilan No. 2 560/2016, dated 3 May 2016) because this is the reason of changing the decision on support measure.⁵

On the other hand, failure to fulfil regular school obligations is certainly the basis for changing the decision on the support measure, so the Court of Appeals in Gjilan, in its Judgment No. 2 351/2016, dated 17 June 2016, emphasizes that if a student (up to the age of 26) does not regularly meet school obligations, the alimony debtor (parent) always has the opportunity to request a change in the decision on the maintenance measure. There is also a contrary position of the High Court of Cassation, stating that the age of the child does not affect the change of the amount of alimony and thus from the decision of the High Court of Cassation no. Rev 2801/2020, dated 11 August 2020, results that if the needs and measures of alimony for minor children are determined, the same cannot be increased based on the age of the child, even though the children have reached the age of 15, because children have no additional needs at that age. The change of circumstances in terms of supporting another minor child does not relieve the parent from the obligation to contribute to the maintenance of the child (From the judgment of the High Court of Cassation, Rev. 2247/2016, dated 11.10.2016), but it can certainly affect the change of maintenance. Therefore, VKS in its judgment no. Rev 2222/2020, dated 15 November 2020, where in this present case, the circumstances of the family supporter (parents) have changed, e.g., has the obligation to support a minor child, who was born after the decision when the support measure was taken, holds the position that this is the reason for changing the decision on the support measure.⁶

The marriage ending afterwards can be the basis for changing the amount of support. In the Judgement of the High Court of Cassation no. Rev 3989/2020, dated 1 October 2020,

⁵ Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE). *Adjudication of family law cases in Kosovo: Case management issues*. February 2011, pp. 21.

⁶ Ibid.

the court states that, in determining the alimony amount, the court takes into account the amount of income and personal needs and obligations that the parent (support provider) has in case of maintenance of other persons, e.g., if he is remarried, obligations are increased against the woman who is unemployed, etc. The Judgment of the Court of Appeals in Prishtina, No. 2 211/2017, dated 13 April 2017 is interesting, the court holds that the fact the supporter of the family has not contributed to the maintenance of his children has placed him in such a situation of accumulation of unpaid maintenance contributions and hence cannot lead to a reduction of obligations or reduction of contributions for the maintenance of minor children.⁷ Partnership conflicts cannot affect the determined amount of alimony (From the judgment of the Court of Appeals in Prishtina, V2 251/2018, dated 4 April 2018).

Going to serve a prison sentence is undoubtedly the basis for changing the measure of service, so the judgment of the High Court of Cassation, Rev 2844/2017, dated 7 December 2017, derives that the obligation to support a child cannot be held at the current level if the alimony debtor has changed circumstances – he/she will serve a prison sentence, due to which extraordinary circumstances prevented him/her from earning more than a salary for work in prison, which is lower than average income that can be earned under regular conditions.

CONCLUSION

To this point, we have presented a number of interesting judgments for changing the common alimony in practice, which should be considered as an example, but with reservations, because the court, in each case, takes into account all facts that may affect the determination of alimony or change it, regardless of the applicant, i.e., the circumstances on the part of the support provider and the circumstances of the influence on the part of the support recipient. The court is certainly guided by the fact that the maintenance amount should provide at least such a standard of living for the child, which is enjoyed by the custodial parent. That is, although the basis is the same, often all other circumstances in a given case may be different, and hence affect the court decision to be different for this often-contradictory reason, compared to some of the previous ones.

⁷ Iniciativa për Drejtësi dhe Barazi (INJECT). *Common Property and Financial Retention, Law and Practice*. September 2019, pp. 33.